No. 17-1299

IN THE
Supreme Court of the United States

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,
Petitioner,

v.

GILBERT P. HYATT,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

BRIEF OF LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

Amici curiae, who are listed in the Appendix, are professors of constitutional law, civil procedure, conflict of laws, and other legal fields. They have an interest in the proper development of structural constitutional law, including the doctrine of state sovereign immunity. *Amici* offer their views on whether the Court should overrule *Nevada* v. *Hall*, 440 U.S. 410 (1979).*

SUMMARY OF ARGUMENT

Nevada v. Hall, 440 U.S. 410 (1979), which rejected the principle of interstate sovereign immunity, was wrongly decided and should be overruled. The discussion here proceeds in two parts.

I. *Hall* conflicts with constitutional text, structure, and history. Ratification occurred against a historical understanding that states could not hale non-consenting sister states into their courts. Constitutional text and structure embrace this principle of interstate sovereign immunity both by preserving the immunity and by prohibiting its abrogation at the hands of sister states.

Under the Constitution, states maintain core attributes of sovereignty, including a robust conception of sovereign immunity. The selection of the word "state" may support this notion. And the Eleventh Amendment, which forbids the adjudication of any suit against a state by a citizen of another state in federal court, makes little sense if states are not also immune from suit in sister-state courts. "[T]he sovereign

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* The parties have filed blanket consents to the filing of *amicus* briefs. No counsel for a party authored this brief in whole or in part, and no counsel for a party (nor a party itself) made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

immunity of the states neither derives from, nor is limited by, the terms of the Eleventh Amendment." *Alden v. Maine*, 527 U.S. 706, 713 (1999). Instead, the purpose of the Eleventh Amendment was to overturn *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), which had held that a South Carolinian could sue Georgia in federal court. As Justice Blackmun stated when dissenting in *Hall*, "[i]f the Framers were indeed concerned lest the States be haled before the federal courts—as the courts of a higher sovereign—how much more must they have reprehended the notion of a State's being haled before the courts of a sister state." 440 U.S. at 431 (Blackmun, J., dissenting).

In addition, the Constitution limits the power that each state may exercise. Some of these limitations are structural, including the principle that because states are coequal sovereigns, they may not exercise legislative power over one another to decide interstate disputes. For similar reasons, states generally may not exercise judicial power over one another by haling sister states into their courts.

The principle of interstate sovereign immunity was well accepted among the founding generation. Both the Federalists and the Antifederalists premised their arguments for and against the Constitution on the assumption that states could not be sued in sister-state courts (or in any courts) without their consent. This understanding was on full display in *Nathan v. Virginia*, 1 U.S. (1 Dall.) 77 (Pa. Ct. Com. Pl. 1781). By holding that Virginia could not be haled into a Pennsylvania court without its consent, *Nathan* echoed the dominant sentiment at the time—that states were immune from suit in the courts of sister states.

II. Forum states cannot abrogate the sovereign immunity of sister states. Professor William Baude's recent argument to the contrary, *see* William Baude, *Sovereign Immunity and the Constitutional Text*, 103 Va. L. Rev. 1 (2017), is therefore incorrect.

Among other issues, this argument does not adequately address the contention that Article III's "provision for state/citizen diversity and the original jurisdiction of the Supreme Court in state-as-party cases meant that any aboriginal power in the state courts to hold each other involuntarily liable to individuals' suits had been ceded to the federal courts." Ann Woolhandler, *Interstate Sovereign Immunity*, 2006 Sup. Ct. Rev. 249, 266. And Baude's attempt to rescue *Hall* by suggesting that a state could fend off a plaintiff from enforcing a default judgment in the state's own courts fails to take appropriate account of the dignitary interests that support sovereign immunity and seems difficult to square with principles relating to the Full Faith and Credit Clause.

In short, the Court should overrule *Hall* and recognize the important constitutional principle of interstate sovereign immunity.

ARGUMENT

In *Nevada v. Hall*, 440 U.S. 410 (1979), this Court rejected the principle of interstate sovereign immunity by holding that states can hale non-consenting sister states into their courts. Scholars of constitutional law have long argued that this holding was erroneous. *See, e.g.*, Gary J. Simson, *The Role of History in Constitutional Interpretation: A Case Study*, 70 Cornell L. Rev. 253 (1985); Ann Woolhandler, *Interstate Sovereign Immunity*, 2006 Sup. Ct. Rev. 249. The time has come for the Court to overrule *Hall* and hold that interstate sovereign immunity generally protects states from suit in sister-state courts.

This brief makes two arguments. First, *Hall* was wrongly decided as a matter of constitutional text, structure, and history. Second, the contention that forum states can abrogate the sovereign immunity of sister states is incorrect. The Court should thus abandon *Hall* and hold that interstate sovereign

immunity represents a fundamental part of our constitutional system.

I. Constitutional text, structure, and history all support the principle of interstate sovereign immunity.

Interstate sovereign immunity was well known and well accepted at the time of the founding. Constitutional text, structure, and history all support the proposition that states generally cannot hale sister states into their courts.

A. Constitutional text and structure embrace the principle of interstate sovereign immunity.

As described below, "Article III was enacted against a background assumption that the states could not entertain suits against one another." Woolhandler, *supra*, at 263. Constitutional text and structure adopt this background assumption in two ways: by preserving interstate sovereign immunity and by prohibiting states from abrogating the immunity of sister states.

First, the Constitution secures the fundamental sovereign prerogatives of the several states. *See Printz v. United States*, 521 U.S. 898, 918–19 (1997) ("It is incontestible that the Constitution established a system of dual sovereignty. Although the States surrendered many of their powers to the new Federal Government, they retained 'a residuary and inviolable sovereignty.'" (some internal quotation marks omitted) (citations omitted) (quoting *The Federalist No. 39*, at 245 (J. Madison) (Clinton Rossiter ed., 1961)). Sovereign immunity is one such prerogative. *See* Jesse H. Choper & John C. Yoo, *Who's Afraid of the Eleventh Amendment? The Limited Impact of the Court's Sovereign Immunity Rulings*, 106 Colum. L. Rev. 213, 220 (2006) ("As the Court made emphatically clear . . . , the Constitution had in fact

established the rule of state sovereign immunity even before the ratification of the Eleventh Amendment." (citing *Alden v. Maine*, 527 U.S. 706, 715–19, 754 (1999)).

Indeed, there is reason to think that interstate sovereign immunity is inherent in the word "state." At the founding, this word "denoted an independent country that possessed complete or a significant degree of sovereignty." Michael B. Rappaport, *Reconciling Textualism and Federalism: The Proper Textual Basis of the Supreme Court's Tenth and Eleventh Amendment Decisions*, 93 Nw. U. L. Rev. 819, 821 (1999). So the Constitution's use of "states" (rather than "counties" or "districts") "strongly suggests that [the Framers] intended these governments to retain a significant degree of sovereignty," including immunity from suit in sister-state courts. *Id.* at 821–22. And this is so even if one sees the term as a "shorthand for structural considerations" rather than as a "font of meaningful textual analysis." Ernest A. Young, Alden v. Maine *and the Jurisprudence of Structure*, 41 Wm. & Mary L. Rev. 1601, 1624 (2000).

Moreover, the Eleventh Amendment—which provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State," U.S. Const. amend. XI—makes little sense absent a background of interstate sovereign immunity.

The Eleventh Amendment was an "explanatory amendment," meaning one designed to "correct or clarify ambiguities in the law." James E. Pfander, *History and State Suability: An "Explanatory" Account of the Eleventh Amendment*, 83 Cornell L. Rev. 1269, 1315 (1998). In particular, the amendment was aimed at abrogating *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), which had allowed a South Carolina citizen to sue the State of Georgia in federal court. *See* Pfander, *History and State Suability*, *supra*, at

1279–80; *see also* Bradford R. Clark, *The Eleventh Amendment and the Nature of the Union*, 123 Harv. L. Rev. 1817, 1896–99 (2010).

Accordingly, "the narrow scope of the [Eleventh] Amendment is easily explained by the fact that it was only intended to overrule *Chisholm*. It was not necessary to establish sovereign immunity more generally, because the original Constitution had already done so." Rappaport, *supra*, at 872; *see Hall*, 440 U.S. at 431 (Blackmun, J., dissenting) ("If the Framers were indeed concerned lest the States be haled before the federal courts—as the courts of a higher sovereign—how much more must they have reprehended the notion of a State's being haled before the courts of a sister State. The concept of sovereign immunity prevailed at the time of the Constitutional Convention. It is, for me, sufficiently fundamental to our federal structure to have implicit constitutional dimension." (internal quotation marks and citation omitted)); *id.* at 437 (Rehnquist, J., dissenting) (stating that "it is . . . clear that the States that ratified the Eleventh Amendment thought that they were putting an end to the possibility of individual States as unconsenting defendants in foreign jurisdictions, for . . . they would have otherwise perversely foreclosed the neutral federal forums only to be left to defend suits in the courts of other States"); *id.* at 432–33 ("I think the Court's decision today works a fundamental readjustment of interstate relationships which is impossible to reconcile . . . with . . . the logic of the constitutional plan itself.").

This Court has thus long recognized that "the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment." *Alden v. Maine*, 527 U.S. 706, 713 (1999). Instead, the Court has declared, "as the Constitution's structure, its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and

which they [generally] retain today." *Id.*; *see, e.g.*, *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 752 (2002) ("[T]he [Constitutional] Convention did not disturb States' immunity from private suits, thus firmly enshrining this principle in our constitutional framework."); *Hans v. Louisiana*, 134 U.S. 1, 10, 16 (1890) (rejecting the plaintiff's argument that "being a citizen of Louisiana," he was "not embarrassed by the obstacle of the eleventh amendment, inasmuch as that amendment only prohibits suits against a state which are brought by the citizens of another state, or by citizens or subjects of a foreign state" because "[t]he suability of a state, without its consent, was a thing unknown to the law"); *see also* Br. for Pet'r 26–28.

Because "the original Constitution" "establish[ed] sovereign immunity more generally," Rappaport, *supra*, at 872, interstate sovereign immunity represents a kind of lesser-included immunity within a well-accepted system of constitutional immunity principles. States, for instance, are generally not suable in their own courts absent consent. *See Alden*, 527 U.S. at 754. Nor are they generally suable in federal courts absent consent. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72 (1996). It would be illogical for immunity principles to protect states from suit in their own courts and federal courts but not in the single class of forums most likely to exhibit hostility toward their interests: sister-state courts. *See* Simson, *supra*, at 262–63 (arguing that the framers were likely more concerned about suits in state courts than federal courts "in light of the less neutral nature of state tribunals"); *see also* Br. for Pet'r 40–42.

Second, the Constitution limits each state's power. Some limitations are textual. *See, e.g.*, U.S. Const. art. I, § 10 (listing multiple limitations). And some limitations are structural. For example, because "implications from the constitutional structure" render states "coequal sovereigns," "neither party to an interstate dispute has legislative power to prescribe rules of decision binding upon the other." Bradford R. Clark, *Federal*

Common Law: A Structural Reinterpretation, 144 U. Pa. L. Rev. 1245, 1325 (1996); *see also* Anthony J. Bellia Jr. & Bradford R. Clark, *General Law in Federal Court*, 54 Wm. & Mary L. Rev. 655, 713 (2013) ("Disputes between states are beyond the authority of either state to resolve . . . ."); Caleb Nelson, *The Persistence of General Law*, 106 Colum. L. Rev. 503, 508 (2006) (explaining that "commentators have agreed that the Constitution implicitly strips the states of lawmaking power" over boundary disputes and water disputes, such that a state "cannot authoritatively resolve the dispute simply by passing a statute arrogating all of the disputed territory or water to itself").

Congress can abrogate state sovereign immunity in certain circumstances. *See Alden*, 527 U.S. at 756 ("[I]n adopting the Fourteenth Amendment, the people required the States to surrender a portion of the sovereignty that had been preserved to them by the original Constitution, so that Congress may authorize private suits against nonconsenting States pursuant to its § 5 enforcement power."). But other states cannot. Just as the Constitution forbids states from reaching beyond their borders to exercise legislative power over one another by the means discussed above, the Constitution forbids states from reaching beyond their borders to exercise judicial power over one another by haling sister states into their courts (where, as here, Congress has not abrogated state sovereign immunity). *See* Woolhandler, *supra*, at 265 ("Article III's provision for state/citizen diversity and the original jurisdiction of the Supreme Court in state-as-party cases meant that any aboriginal power in the state courts to hold each other involuntarily liable to individuals' suits had been ceded to the federal courts, and would be decided (most likely in the Supreme Court) as a matter of what would be effectively federal law, not state law."); *see also* Br. for Pet'r 35 ("By entering into the federal compact, the States chose to give up a part of their sovereign power to adjudicate disputes.").

In short, the Constitution's text and structure confirm that the historical principle of interstate sovereign immunity represents a fundamental aspect of our governmental system. It is to that historical principle that the discussion now turns.

B. The founding generation recognized the historical principle of interstate sovereign immunity.

"[T]he framers understood the law of nations to deprive the state courts of the power to hear" "suits against the states." James E. Pfander, *Rethinking the Supreme Court's Original Jurisdiction in State-Party Cases*, 82 Calif. L. Rev. 555, 635 (1994). Indeed, "the impossibility of unconsented *in personam* suits against states in the courts of other states was a foundation on which all sides of the framing era debates" agreed. Woolhandler, *supra*, at 253.

A few examples must suffice here. Edmund Pendleton—who was the president of the Virginia Ratifying Convention—declared during the convention that "calling a sovereign state before the jurisdiction of another sovereign state" was an "impossibility." 3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 549 (Jonathan Elliot ed., 1836), *quoted in* Pfander, *Rethinking Original Jurisdiction*, *supra*, at 635. And Edmund Randolph—who was a delegate to the Constitutional Convention, governor of the Commonwealth during the Virginia Ratifying Convention, and later the first attorney general of the United States—made similar remarks when advocating ratification. *See* Pfander, *Rethinking Original Jurisdiction*, *supra*, at 635–36. Randolph also wrote in a 1790 report to Congress that "as far as a particular state can be a party defendant, a sister state cannot be her judge." 4 *The Documentary History of the Supreme Court of the United States, 1789–1800: Organizing the Federal Judiciary* 130 (Maeva Marcus ed., 1992), *quoted in* Pfander, *Rethinking Original Jurisdiction*, *supra*, at 637; *see* Br. for Pet'r 23–25

(exploring the larger context of the ratification debates and discussing statements made by Alexander Hamilton, by James Madison, and by John Marshall arguing that Article III did not permit plaintiffs to bring suits against non-consenting states).

Antifederalists agreed. For they adhered to the view that, before ratification, states were "not . . . suable in *any* court absent consent." Woolhandler, *supra*, at 257 (emphasis added); *see* Br. for Pet'r 23 (discussing statements made by the Federal Farmer and by Brutus).

The principle of interstate sovereign immunity animated the famous pre-ratification case of *Nathan v. Virginia*, 1 U.S. (1 Dall.) 77 (Pa. Ct. Com. Pl. 1781), where a Pennsylvania court dismissed a suit brought by a Pennsylvania citizen against the Commonwealth of Virginia. There, William Bradford—who was then the attorney general of Pennsylvania and later succeeded Randolph to become the second attorney general of the United States—"urged simply, and successfully, that the issuance of process to Virginia violated the law of nations, which regarded each sovereign as equal and independent and thus immune from suit in another sovereign's courts." Pfander, *Rethinking Original Jurisdiction*, *supra*, at 585–86.

Nathan, moreover, carried great "significance to the men who framed the Constitution":

> Nathan was represented . . . by none other than James Wilson, . . . the guiding force behind both the Pennsylvania constitutional provision that authorized suits against that state and the Original Jurisdiction Clause of the Constitution. Among the Virginia delegates who signed communiques with the Pennsylvania Supreme Executive Council was James Madison. Letters from Thomas Jefferson, the sitting governor of Virginia at the time, reflect his interest in the case; he was at least sufficiently concerned to

> request of . . . Pendleton . . . his opinion of the case's merits.

Id. at 586–87 (footnotes omitted). At bottom, "[t]he disposition of *Nathan* in favor of law-of-nations immunity deserves to be viewed as a decisive rejection of state suability in the courts of other states" during the pre-ratification period. *Id.* at 587; *see id.* at 587 n.127 (explaining that "[m]uch the same result was reached in a Pennsylvania admiralty court decision from the same period" (citing *Moitez v. The South Carolina*, 17 F. Cas. 574 (Adm. 1781) (No. 9697))).

As described above, the text and structure of the Constitution reflect the adoption of this foundational principle. Petitioner is thus correct to contend that "a considerable body of historical evidence" supports the proposition that interstate sovereign immunity is an inherent part of our constitutional scheme. Br. for Pet'r 20 (explaining that "[f]irst, States were immune from suit in each other's courts during the pre-ratification era"; "[s]econd, participants on all sides of the ratification debates agreed that the Constitution did not render States more amenable to suit in the courts of other States than they had been before"; and "[t]hird," among other things, "the backlash to this Court's decision in *Chisholm*—culminating in the enactment of the Eleventh Amendment—confirmed the consensus that States were immune from suit in other States' courts as well as in the new federal courts").

II. The argument that forum states can abrogate interstate sovereign immunity is incorrect.

In a recent article that raises important considerations, Professor William Baude argues that *Hall* was correct to allow a state to hale a non-consenting sister state into its courts. William Baude, *Sovereign Immunity and the Constitutional Text*, 103 Va. L. Rev. 1 (2017). Baude's argument deserves consideration. But it is ultimately unconvincing.

Baude characterizes interstate sovereign immunity as a "constitutional backdrop." *Id.* at 8. He contends, however, that forum states can abrogate the sovereign immunity of sister states. *Id.* at 24–28. "The Constitution doesn't limit states to enumerated powers and imposes relatively few constraints on their treatment of one another," Baude argues. *Id.* at 24. So because no particular constitutional provision prohibits one state from nullifying the sovereign immunity of another, Baude contends that such nullification is permissible. *See id.* at 25–28.

Baude recognizes the potential perversity of *Hall*'s holding that states are suable in the most hostile forums in the nation, sister-state courts. *See id.* at 28–29. He attempts to head off this difficulty, however, by arguing that a state can decline to appear in a sister-state court and then argue that the resulting default judgment is unenforceable when the plaintiff comes to collect in the state's own courts. *See id.* at 29 (stating that the forum state "might discover that its judgments encounter serious legal and practical obstacles elsewhere").

Baude's argument is misguided. As explained above, the Constitution both preserves interstate sovereign immunity and prohibits states from abrogating the immunity of sister states. *See supra* Part I.A.

Baude, moreover, fails to take seriously enough the argument that Article III's "provision for state/citizen diversity and the original jurisdiction of the Supreme Court in state-as-party cases meant that any aboriginal power in the state courts to hold each other involuntarily liable to individuals' suits had been ceded to the federal courts." Woolhandler, *supra*, at 265. Baude simply deems it "unlikely" that Article III would have stripped states' powers to abrogate sister-state immunities without expressly saying so, especially if Article III also preserved states' preexisting immunities. Baude, *supra*, at 27.

Far from unlikely, the former is totally consistent with the latter because certain immunity principles represent part of the "residuary and inviolable sovereignty" of states, *Printz*, 521 U.S. at 919, but any power to abrogate such principles does not. *See Alden*, 527 U.S. at 713 (stating that "the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution"); *see also* Br. for Pet'r 34 (stating that "States have a sovereignty interest in hearing disputes that arise within their borders, including disputes against other States," but arguing that those interests "must be reconciled with another weighty sovereignty interest: each State's immunity from suit in the courts of other States"—and that "[t]here is little question which of those competing interests carried greater weight at the time the Constitution was ratified").

Baude's argument about default judgments cannot salvage *Hall*. Advocating unenforceability ex post is by no means an adequate substitute for asserting sovereign immunity ex ante. If it were, then sovereign immunity would serve little meaningful function in the international context. But, of course, recognizing the "equal dignity" of a foreign sovereign "depends on the forum nation's courts' declining to assert jurisdiction" in the first place. Peter J. Smith, *States as Nations: Dignity in Cross-Doctrinal Perspective*, 89 Va. L. Rev. 1, 6 (2003) (internal quotation marks omitted). This Court has accordingly made clear that sovereign immunity is an immunity from suit, not a mere defense to liability. *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 145–46 (1993). This means that sovereign immunity is "effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (concerning qualified immunity); *see Metcalf & Eddy*, 506 U.S. at 145 (comparing sovereign immunity to qualified immunity in this regard); *see also* Br. for Pet'r 36–39 (discussing the weighty dignitary and self-government interests served by sovereign immunity).

Moreover, it is unclear why, under longstanding principles articulated by this Court, the Full Faith and Credit Clause would not require a state's own courts to recognize a sister state's default judgment. After all, there is "no roving 'public policy exception' to the full faith and credit due judgments." *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 233 (1998); *see Fauntleroy v. Lum*, 210 U.S. 230, 236 (1908) (Holmes, J.) (rejecting the notion that "the illegality of the original cause of action in [one state] can be relied upon there as a ground for denying a recovery upon a judgment of another state"). To be sure, "[a] State is not required . . . to afford full faith and credit to a judgment rendered by a court that did not have jurisdiction over the subject matter or the relevant parties." *V.L. v. E.L.*, 136 S. Ct. 1017, 1020 (2016) (internal quotation marks omitted). But Baude does not seem to think that any limitations on the enforceability of a judgment in this context sound in subject-matter jurisdiction. And to the extent that he suggests that such limitations sound in personal jurisdiction, his argument would require a fundamental shift in this Court's frame of reference. *See Wisc. Dep't of Corr. v. Schacht*, 524 U.S. 381, 395 (1998) (Kennedy, J., concurring) (stating that "modifying our Eleventh Amendment jurisprudence to make it more consistent with our practice regarding personal jurisdiction" would require a "substantial revision").

In sum, constitutional text, structure, and history all support the principle of interstate sovereign immunity, and one state cannot abrogate the sovereign immunity of another.

CONCLUSION

For the foregoing reasons, this Court should overrule *Nevada* v. *Hall*, 440 U.S. 410 (1979).

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APPENDIX

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